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IN THE

# SUPREME COURT OF THE UNITED STATES

No. 74-1314

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LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - - Petitioners

vs.

GEORGE BURTON, Director of Public Safety, and
LOUISVILLE CIVIL SERVICE BOARD - Respondents

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## PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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# SUPREME COURT OF THE UNITED STATES

No. _____

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, and
BERT J. HEUSER - - - - - *Petitioners*

*v.*

GEORGE BURTON, Director of Public Safety, and
LOUISVILLE CIVIL SERVICE BOARD - *Respondents*

## PETITION FOR CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The Petitioners, Louisville Lodge No. 6, Fraternal Order of Police, and Bert J. Heuser, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the Kentucky Court of Appeals entered in this proceeding on the 31st day of January, 1975.

### OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 518 S. W. 2d 777 (1975).

### JURISDICTION

The date of the entry of the judgment sought to be reviewed is January 31, 1975. A mandate of the Kentucky Court of Appeals of March 4, 1975 affirmed the original decision, and this Petition for Certiorari

was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1257 (3).

## QUESTIONS PRESENTED

1. Whether Kentucky Revised Statutes 90.220 (2) prohibits a police officer employed by a city of the first-class from becoming a candidate for the office of Alderman on the Board of Aldermen of a city of a first-class?
2. Whether the actions of the City of Louisville Chief of Police in suspending the Petitioner, Bert J. Heuser, because he became a candidate for the office of Alderman was arbitrary, capricious, and a violation of his rights under the Constitution of the United States or under other laws?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Civil Service Rule II, Section 4, states as follows:

"POLITICAL ACTIVITY (Amendment Number XXI, Adopted 9 August 1962) Persons holding positions in the classified service shall not be discriminated against in any way because of their political or religious opinions or affiliations or because of their exercise of their right to vote as they please.

"No person in the classified service, nor any person on leave of absence from a position in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of

Police, Assistant Chief of Police, Chief of Firemen, nor Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit any assessment, subscription or contribution, to or for any political party, or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee, or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; or in any manner be concerned therewith, provided, however, that nothing herein shall prevent any such person from freely expressing his or her views as a citizen or from casting his or her vote in any election.

"Any person who shall violate this section shall be summarily dismissed from the service by the appointing authority (or, if a member of the Board, by the Mayor) and may not be employed in any service of the City, classified or unclassified, for a period of one year next thereafter; provided, however, that should the appointing authority fail or refuse to so dismiss, the Board (except when a member thereof is charged with violation of this section) shall conduct a hearing, which the accused person may attend with counsel. If the Board finds the accused guilty of violation of this section, the Board shall dismiss such violator, with the consequent disqualification. Such action of the Board is final."

The Kentucky Statutes here involved are as follows:

Kentucky Revised Statutes 90.220 (2) states:

"No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters, provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizen or to cast his or her vote in any election."

Kentucky Revised Statutes 95.015 states:

"Members of the police and fire departments in cities shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

The Constitutional provision here involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is set out as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner, Bert J. Heuser (herein referred to as "Heuser"), was a policeman employed by the Louisville Division of Police and is a member of Petitioner, Louisville Lodge No. 6, Fraternal Order of Police. He filed as a candidate for the office of Alderman of the City of Louisville in a Democratic Party primary. When Heuser refused to withdraw as a candidate, the Office of the Louisville Chief of Police suspended him from duty on the grounds that he was in violation of Kentucky Revised Statutes 90.220 and Rule II, Section 4 of the Rules and Regulations of the Louisville Civil Service Board. Heuser's suspension was approved by the Director of Public Safety on April 29, 1971. An appeal was taken to the Louisville Civil Service Board which refused to act on the matter, and the lawsuit herein was commenced. On May 12, 1971,

the Trial Court issued an opinion in favor of the Respondents (Appendix, pp. 13-19). On January 31, 1975, the Kentucky Court of Appeals issued an opinion affirming the judgment of the lower Court (Appendix, pp. 21-24).

## ARGUMENT

### I. Kentucky Revised Statutes 90.220 (2) Does Not Prohibit a Police Officer Employed by a City of the First-Class From Becoming a Candidate for the Office of Alderman on the Board of Aldermen of a City of the First-Class.

Kentucky Revised Statutes Chapter 90, enacted in 1942, provided for the creation of a Civil Service Board, the employment of a personnel director, rules and regulations for classification and promotion, eligibility list, appointments, dismissals and demotions, and included a section entitled, "90.220, Political activity prohibited, penalty." The legislature therein enumerated the activities it saw fit to prohibit, but made no mention of prohibition from being a candidate for office.

The purpose of civil service laws historically arose out of an attempt to thwart the "spoils system". Civil service is supposed to apply based upon the applicant's ability and theoretically to eliminate as far as practicable the elements of partisanship and personal favoritism. While Chapter 90 recites no intent as to what the legislators had in mind in creating the city civil service, Petitioners contend that the purpose of Chapter 90 was: (1) to free the municipal employee from

partisan politics and (2) to give the people more efficient service. It was not intended to cover the specific situation of a civil servant running for office but was designed to protect such employee from making financial contributions to a party or a candidate.

To construe the Statute to include a prohibition of becoming a candidate would be to add to the very specific enumerations of political activities prohibited. The construction of the Statute is governed by the ancient legal maximum "expressio unius est exclusio alterius"—meaning that the expression of one thing is the exclusion of another.

This doctrine was incorporated into Kentucky law in *Burgin* v. *Forbes,* 293 Ky. 456, 169 S. W. 2d 321 (1943). In the instant case, the legislature has specifically enumerated in detail various activities, which come within the general category of political activities, which are prohibited to persons in the classified service. These include, among other things, prohibitions against giving, soliciting, receiving, or remitting any assessment, subscription or contribution to or for a political party or candidate, and against being a member of a campaign committee or an election officer or a worker at the polls on election day.

The obvious intent of these prohibitions is to insulate employees in the classified service from pressure from their superiors and from candidates who may become their superiors to assist them in their campaigns. The legislators, all of whom were elected, knew very well the nature of a political campaign and knew very well precisely what activities they wished em-

ployees of cities to refrain from. The legislature spoke with precision.

By precluding a city employee, such as the Plaintiff, from becoming a candidate for office, one does not combat the evil sought to be eradicated by this Statute—namely, the spoils system of political patronage.

In *City of Miami* v. *Sterbenz,* Fla., 203 So. 2d 4 (1967), the Supreme Court of Florida was faced with a statute very similar to Kentucky Revised Statutes 90.220 (and Civil Service Rule II, Section 4). In that case, the state statute and the city ordinance provided as follows:

> "No officer or employee of the city shall directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or any political purpose whatever. No person holding position in the classified service shall take part in political management or affairs or in political campaigns further than to cast his vote or express privately his opinion" (at p. 5).

There, the court held:

> "We here simply hold that the particular language of the court and statute is not sufficiently definitive to effect a prohibition against candidacy for public office by an employee in the classified service. A reasonably specific statute may well produce a different result." (at p. 6)

Likewise, in the instant case, Kentucky Revised Statutes 90.220 is not sufficiently definitive to prohibit

an employee from becoming a candidate for public office.

In *Kinnear* v. *City and County of San Francisco,* 38 Calif. Reporter 631 (1964), the plaintiff was employed by the defendant as a deputy sheriff. The plaintiff filed as a candidate for the office of Sheriff and was on the same date dismissed for violation of a rule of city government which provided that any appointed officer or employee who became a candidate for election to a public office shall automatically forfeit his position. The Court found for the plaintiff stating such a rule as being an unconstitutional abridgment of fundamental rights.

With reference to interpretation as to whether Kentucky Revised Statutes 90.220 is to be extended so as to prohibit a public servant from running for office, we contend that the U. S. Supreme Court has placed upon the state the burden of showing that a compelling reason is present and that the statute requires that the restriction must be drawn with narrow specificity. *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 329, 9 L. Ed. 2d 405 (1963).

The Kentucky Court of Appeals, in its decision, stated:

> "This Court is of the opinion that the implication in KRS 90.220(2) of the prohibition against candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language . . . " (Appendix, p. 24).

The Petitioners argue that the Kentucky Statute in question is not definitive in any regard to support

the decision of the Kentucky Court of Appeals, and therefore, was arbitrary and deprived Heuser of his rights guaranteed by the Fourteenth Amendment to the United States Constitution.

**II. The Actions of the City of Louisville Chief of Police in Suspending the Petitioner, Bert J. Heuser, Because He Became a Candidate for the Office of Alderman Was Arbitrary, Capricious, and a Violation of His Rights Under the Constitution of the United States and Under Other Laws.**

We now arrive as to whether the actions of the Chief of Police in following the Rules and Regulations of the Louisville Civil Service Board and the Kentucky Revised Statutes were constitutionally correct and whether or not the legislature can politically sterlize public service employees to the point where said employees must forfeit their rights as a civil servant by filing for public office. The First Amendment of the United States Constitution includes the freedom from having government placing unconstitutional prerequisites upon public employees as a condition of continued employment.

In *Minielly* v. *State of Oregon*, 411 P. 2d 69 (1966), plaintiff was a deputy sheriff who announced his intention to become a candidate for sheriff. He was told, as was Heuser here, that if he did so he would violate a state statute and would automatically forfeit his civil service position. Plaintiff argued that such a state statute violated his constitutional rights. The Court concluded that, "It must be conceded that running for public office is one of the means of political expression

which is protected by the First Amendment. The right to engage in political activity is implicit in the rights of association and free speech guaranteed by the amendment." (at p. 73) The Court went on to cite the case of *Lamont* v. *Postmaster General,* 85 S. Ct. 1493 (1965), which states, ". . . the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful." (at p. 1497)

The right to associate for the advancement of political beliefs is, of course, one of our "most precious freedoms" and is protected by the First Amendment. *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *NAACP* v. *Button, supra.*

In *Fort* v. *Civil Service Commission,* 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P. 2d 385 (1964), the Court held unconstitutional a section of a county charter prohibiting Civil Service employees from taking part in political management or affairs in any political campaign or election, as conflicting with the First Amendment. In the companion case of *Kinnear* v. *City and County of San Francisco, supra,* the Court held as too broad a provision of the county charter requiring any Civil Service employee who becomes a candidate for election to any public office to forfeit his position.

In *De Stefano* v. *Wilson,* 96 N. J. Super. 592, 233 A. 2d 682 (1967), the Superior Court of New Jersey held unconstitutional a rule of the city fire department prohibiting firemen from taking an active part in politics or political contests or engaging in controversy

concerning candidates or issues. The plaintiff ran for councilman and refused the request of the Director of Law and Public Safety that he take a leave of absence. During the campaign, he was served with charges specifying his conduct in running for office. The Court permanently enjoined the defendants from proceeding against the plaintiff, holding that the rule is overbroad. The Court there stated:

> "Plaintiff is not charged with having conducted his political campaign while on duty. Nor is he charged with neglecting his duties as a fireman or in any way subserving the responsibilities of his position to his personal political objectives." (at p. 687)

In *City of Miami* v. *Sterbenz, supra,* the Court upheld the lower court's ruling that the first provision of this statute and ordinance, that employees shall not make, solicit or receive contributions for any political purpose, or be in any manner concerned with such activity, was invalid for ambiguity, being too broad and vague to be sustained. The same is certainly true in the instant case.

In *Mancuso* v. *Taft,* 341 F. Supp. 574 (1972), a police officer became a candidate for nomination for representative to the Rhode Island General Assembly in violation of the City Charter relating to political activities of its classified civil service employees. He was faced with suspension from employment when he brought that suit for declaratory and injunctive relief. There, the city charter prohibited a city employee from "continuing in the classified service of the City after

becoming a candidate for nomination or election to any political office . . ." and required the removal of any employee violating that prohibition. The Court stated, while holding the Charter and Civil Service Rules unconstitutional, the following:

> "Involved in the present litigation are the First Amendment rights of government employees to freedom of expression, freedom of association, and freedom of petition the government for redress of grievances. '/S/peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana,* 379 U. S. 64, 74-75 (1964). Much as the right to vote is a fundamental right, protected because it is the citizen's access to participation in the political processes of his State's legislative bodies, *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and thus the means for preservation of all other rights the right to run for public office and engage in political activity would similarly seem to warrant protection." (at p. 581)
>
> "Besides the impairment of the First Amendment rights of public employees, these ordinances act to restrict the rights of the voters of Cranston. Section 14.09(c) in particular tends to limit the field of candidates from whom voters might choose. Section (c) penalizes the prospective candidate by requiring him to resign from government employment before running for nomination or for office. To the affluent candidate or the candidate with affluent supporters, this penalty effect will not foreclose the candidacy. But to the less affluent candidate who draws his supporters from the less affluent segment of the community, the penalty may well foreclose his candidacy." (at p. 581)

> "While it may be permissible to restrict political activities such as using official authority for partisan political purposes, political coercion of subordinates, or non-compliance with the merit system in promotion, the shot-gun approach taken here is impermissible." (at p. 582)

Recently, in *National Association of Letter Carriers* v. *U. S. Civil Service Commission,* 346 F. Supp. 578 (1972), a three Judge U. S. court held that the Hatch Act's prohibition against federal employees taking "active part in political management or in political campaigns" is unconstitutionally vague, overly broad, and chills First Amendment rights.

Therefore, if decision herein stands, it prohibits Heuser from becoming a candidate for the office of Alderman, which we contend is unconstitutional.

Finally, Kentucky Revised Statutes 95.015, in part, provides:

> "No such rule, regulation or law which apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

Civil Service Regulation II, Section 4, which attempts to restrict the rights of employees in the classified service from engaging in political activity, to-wit: running for public office, is in derogation to KRS 95.015 and is repugnant to the Fourteenth Amendment

of the United States Constitution in that in this instant case the Louisville Civil Service Board refused to grant a due process hearing to the Petitioner upon his refusal to withdraw as a candidate for public office. See *Mancuso* v. *Taft, supra.*

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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